# Customs Bulletin

**Regulations, Rulings, Decisions, and Notices concerning Customs and related matters**

# and Decisions

**of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade**

Vol. 26 FEBRUARY 26, 1992 No. 9

*This issue contains:*



THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 92–14)

### RECORDATION OF TRADE NAME: "ALL-STATE WELDING PRODUCTS"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On August 20, 1991, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "ALL-STATE WELDING PRODUCTS," was published in the Federal Register (56 FR 41388). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than October 21, 1991. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "ALL-STATE WELDING PRODUCTS," is recorded as the trade name used by All-State Welding Products Inc., a corporation organized under the laws of the State of Delaware, located at 5112 Allendale Lane, Taneytown, Maryland 21787.

The trade name is used in connection with welding electrodes, brazing, rods, solders, fluxes, powders, chemical aids and equipment for using the same for maintenance and repair applications. The following companies are authorized to use the above trade name: Hi-Tech Welding (PROROD) Ltd., dba All-State Welding Products Canada, located at 57 Galaxy Blvd., Unit 6, Rexdale, Ontario M9W 5P1 Canada, is authorized only in Canada and McNeil Holdings Pty., Ltd., dba All-State Welding Products Distributors, located at 6143 Dellamarta Road, Wangara, Washington, is authorized to use the trade name only in Australia.

EFFECTIVE DATE: February 19, 1992.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202 566–6956).

Dated: February 12, 1992.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, February 19, 1992 (57 FR 6056)]

(T.D. 92–16)

## RECORDATION OF TRADE NAME: "M.T.R. FOOD PRODUCTS"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On December 2, 1991, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "M.T.R. FOOD PRODUCTS," was published in the Federal Register (56 FR 61277). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than January 31, 1992. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "M.T.R. FOOD PRODUCTS," is recorded as the trade name used by MTR Imports, Inc., a corporation organized under the laws of the State of Illinois, located at 18 West 194 Holly Avenue, Westmont, Illinois 60559.

The trade name is used in connection with various Indian food product mixes and powders. The merchandise is manufactured in India.

EFFECTIVE DATE: February 19, 1992.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202 566–6956).

Dated: February 12, 1992.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, February 19, 1992 (57 FR 6057)]

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(T.D. 92–17)

## RECORDATION OF TRADE NAME: "M.T.R. DISTRIBUTORS (P) LTD"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On December 2, 1991, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C.

1124), of the trade name "M.T.R. DISTRIBUTORS (P) LTD," was published in the Federal Register (56 FR 61277). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than January 31, 1992. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "M.T.R. DISTRIBUTORS (P) LTD," is recorded as the trade name used by MTR Imports, Inc., a corporation organized under the laws of the State of Illinois, located at 18 West 194 Holly Avenue, Westmont, Illinois 60559.

The trade name is used in connection with various Indian food product mixes and powders. The merchandise is manufactured in India.

EFFECTIVE DATE: February 19, 1992.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202 566–6956).

Dated: February 19, 1992.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, February 19, 1992 (57 FR 6056)]

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(T.D. 92–19)

## RECORDATION OF TRADE NAME: "M.T.R. CONDIMENTS"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On December 2, 1991, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "M.T.R. CONDIMENTS," was published in the Federal Register (56 FR 61278). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than January 31, 1992. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "M.T.R. CONDIMENTS," is recorded as the trade name used by MTR Imports, Inc., a corporation organized under

the laws of the State of Illinois, located at 18 West 194 Holly Avenue, Westmont, Illinois 60559.

The trade name is used in connection with various Indian food product mixes and powders. The merchandise is manufactured in India.

EFFECTIVE DATE: February 19, 1992.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202 566–6956).

Dated: February 12, 1992.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, February 19, 1992 (57 FR 6056)]

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19 CFR Part 10

(T.D. 92–20)

## RECIPROCAL PRIVILEGES EXTENDED TO AIRCRAFT OF ARGENTINA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by expanding the exemptions from Customs duties and internal revenue taxes on equipment, spare parts, and supplies withdrawn from Customs or internal revenue custody for use by commercial aircraft registered in Argentina. Previously, the exemption for Argentine aircraft supplies has not applied to aircraft fuel and lubricants. The Department of Commerce has advised Customs that the Government of Argentina now affords exemption privileges to U.S.-registered aircraft for fuel and lubricants, in connection with international commercial operations, substantially reciprocal to those exemption privileges which may be provided under U.S. law to aircraft of foreign registry. Accordingly, commercial aircraft of Argentine registry will now be exempt from the payment of duties and taxes on fuel and lubricants withdrawn from Customs or internal revenue custody.

DATES: The exemption became effective on January 27, 1992. This amendment is effective February 11, 1992.

FOR FURTHER INFORMATION CONTACT: William Rosoff, Entry Rulings Branch (202–566–5856).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Sections 309 and 317, Tariff Act of 1930, as amended (19 U.S.C. 1309 and 1317), provide that foreign-registered aircraft engaged in foreign trade may withdraw articles of foreign or domestic origin from Customs or internal revenue custody, for use as supplies (including equipment), ground equipment, maintenance, or repair of the aircraft, without the payment of Customs duties and/or internal revenue taxes. This exemption from duties and taxes is a privilege which may be granted to aircraft registered in a foreign country only if the Secretary of Commerce finds, and so advises the Secretary of the Treasury, that the foreign country in question affords substantially reciprocal privileges to aircraft registered in the United States. Section 10.59(f), Customs Regulations (19 CFR 10.59(f)), lists those foreign countries whose aircraft have been granted such an exemption.

In T.D. 54925(1) an exemption from duties and taxes was granted under 19 U.S.C. 1309 and 1317 to aircraft registered in Argentina with regard to "airline equipment, spare parts, and supplies other than fuel and lubricants." Accordingly, section 10.59(f) reflects this exemption, including the exception thereto regarding fuel and lubricants.

In accordance with 19 U.S.C. 1309(d), the Secretary of Commerce has found, and has so advised the Customs Service, that the Government of Argentina affords exemption privileges for fuel and lubricants to aircraft of U.S. registry, in connection with international commercial operations, substantially reciprocal to those exemption privileges provided to aircraft of foreign registry under 19 U.S.C. 1309 and 1317. This document amends the list in section 10.59(f), Customs Regulations (19 CFR 10.59(f)), by removing the exception which indicated that Argentine commercial aircraft were not exempt from the payment of duties and taxes on fuel and lubricants withdrawn from Customs or internal revenue custody.

The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations and Disclosure Law Branch.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because the subject matter of this document does not constitute a departure from established policy or procedures but merely announces the granting of an exemption for which there is a statutory basis, it has been determined, pursuant to 5 U.S.C. 553(b)(B), that notice and public procedure thereon are unnecessary. In addition, for the same reasons and because Argentina is presently granting reciprocal exemption privileges to U.S. aircraft, a delayed effective date is not appropriate.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12291

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply to regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or by any other statute. In addition, this document does not meet the criteria for a "major rule" as specified in E.O. 12291 and, accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Customs duties and inspection, Imports, Exports.

AMENDMENT TO THE REGULATIONS

Part 10, Customs Regulations (19 CFR Part 10), is amended as set forth below:

## PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * * * *

Section 10.59 also issued under 19 U.S.C. 1309, 1317;

* * * * * * *

2. Section 10.59(f) is amended by adding the number of this Treasury Decision opposite "Argentina" in the column headed "Treasury Decision(s)", and by removing the words "other than fuel and lubricants" opposite "Argentina" in the column headed "Exceptions if any, as noted".

Dated: February 6, 1992.

KATHRYN C. PETERSON,
*Chief,*
*Regulations and Disclosure Law Branch.*

[Published in the Federal Register, February 11, 1992 (57 FR 4936)]

(T.D. 92–21)

## EXTENSION OF UNIMAR, INC. INTERNATIONAL'S CUSTOMS APPROVAL TO INCLUDE ACCREDITATIONS TO PERFORM CERTAIN LABORATORY ANALYSIS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of Unimar, Inc., International's Customs approval to include the accreditation of certain laboratory analyses to be performed for Customs purposes.

SUMMARY: Unimar, Inc., International of Houston, Texas, a Customs approved gauger under § 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs approval to include accreditations to perform the following laboratory analyses at its Houston, Texas facility: API Gravity, sediment and water, sediment by extraction.

SUPPLEMENTARY INFORMATION:

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. Unimar, Inc., International, a Customs-approved commercial gauger, has applied to Customs to extend its Customs approval to include the laboratory analyses named above. Review of Unimar, Inc., International's qualifications shows that the extension is warranted and, accordingly, has been granted.

EFFECTIVE DATE: February 3, 1992.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave. NW, Washington, D.C. 20229 (202–566–2446).

Dated: February 12, 1992.

JOHN B. O'LOUGHLIN,
*Director,*
*Office of Laboratories and Scientific Services.*

[Published in the Federal Register, February 19, 1992 (57 FR 6056)]

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Dominick L. DiCarlo

*Judges*

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

*Senior Judges*

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi

# Decisions of the United States Court of International Trade

(Slip Op. 92–7)

CRESWELL TRADING CO., INC., SOUTH BAY FOUNDRY 1989, D & L SUPPLY CO, SOUTHERN STAR, INC., CITY PIPE & FOUNDRY, INC., CAPITOL FOUNDRY OF VIRGINIA, INC., VIRGINIA PRECAST CORP., AND TECHSALES, INC., PLAINTIFFS, CRESCENT FOUNDRY CO. P. LTD., ET AL., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, ALLEGHENY FOUNDRY CO., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 91–01–00012

[Plaintiffs challenge Commerce's failure to apply item (d) of the Illustrative List of Export Subsidies, incorporated into U.S. law by 19 U.S.C. § 1677(5)(A)(i), in countervailing the Indian government's program to reimburse iron-metal castings exporters. The Court holds that Commerce must examine the Indian program in light of the statutory exception. Remanded.]

(Decided January 31, 1992)

*Brownstein Zeidman & Schomer* (*Irwin P. Altschuler*, *Ronald M. Wisla*) and *Willkie Farr & Gallagher* (*Christopher Dunn*, *Walter J. Spak*, *William J. Clinton*, *Vincent Bowen*) for plaintiffs.

*Kaplan Russin & Vecchi* (*Dennis James, Jr.*) for plaintiff-intervenors.

*Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Velta A. Melnbrencis*) and *Robert E. Nielsen*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

*Collier, Shannon & Scott* (*Paul C. Rosenthal*, *Mary T. Staley*, *Robin H. Gilbert*) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiffs, importers of iron-metal castings from India, move pursuant to Rule 56.1 of the Rules of this Court for judgment upon the agency record contesting the Department of Commerce's determination to countervail the payments provided by the Indian government to iron-metal castings exporters under India's International Price Reimbursement Scheme (IPRS). *Certain Iron-Metal Castings From India*, 55 Fed. Reg. 50,747 (Dep't Comm. 1990) (final admin. review). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988). At issue is whether Commerce has discretion to countervail the IPRS payments by disregarding the exception to the countervailability of the preferential provision of input materials. The Court holds that Commerce must ex-

amine the IPRS in light of the exception to countervailable subsidies provided in item (d) of the Illustrative List of Export Subsidies incorporated into U.S. law by 19 U.S.C. § 1677(5)(A)(i) (1988).

BACKGROUND

In 1980, Commerce imposed a countervailing duty order on certain iron-metal castings from India. *Certain Iron-Metal Castings From India,* 45 Fed. Reg. 68,650 (Dep't Comm. 1980). Pursuant to 19 U.S.C. § 1675 (1988), Commerce conducted an administrative review of the countervailing duty order for the 1985 calendar year and determined the net subsidy for Indian exporters. 55 Fed. Reg. at 50,752.

During the period under review, the Steel Authority of India, Ltd., an Indian government entity, supplied all of the pig iron used by the castings manufacturers. *Id.* at 50,749. Pig iron could be imported by castings exporters if they obtained an advance import license; however, no import license was issued in 1985 to the exporters subject to the investigation. R. at 551. The Indian castings exporters utilized domestic pig iron and availed themselves of the benefit of the IPRS. *Id.* Consequently, the Indian government was able to maintain the price of domestic pig iron at a high level and protect India's pig iron industry.

In order to enable exporters to compete in international markets, the Indian government reimbursed castings exporters for the difference between the higher domestic price and an "international price" announced monthly by India's Ministry of Commerce for the amount of pig iron used in the manufacture of the exported castings. R. at 549–50. The IPRS payments, however, were not available to producers of domestically-sold iron-metal castings. Commerce found the IPRS payments countervailable and stated:

> We consider a government program that results in the provision of an input to exporters at a price lower than to producers of domestically-sold products to confer a subsidy within the meaning of section 771(5) of the Tariff Act. It is irrelevant whether the IPRS is consistent with item (d) because we are not concerned with world market prices but with the alternative price of pig iron commercially available in the domestic market. This [sic], we determine the IPRS program to be countervailable.

55 Fed. Reg. at 50,749 (emphasis added).

DISCUSSION

Plaintiffs argue that the IPRS payments are not countervailable because the exception to the countervailability of the preferential provision of input materials is relevant in examining the IPRS, and they contend that the provision of input materials is countervailable only to the extent the terms are more favorable than world market prices. The government contends that the exception is irrelevant because Commerce interpreted 19 U.S.C. § 1677(5) to grant it broad discretion to determine what is a countervailable subsidy.

In reviewing an agency's interpretation of a statute, "[i]f the statutory language is clear, then 'that is the end of the matter; for the court,

as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) ____, ____, 901 F.2d 1097, 1101 (1990) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)). When the statute is not clear, and the agency has made an interpretation, the court must examine the agency's interpretation as to whether it is "based on a permissible construction of the statute." *Id.* However, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

Countervailing duty law provides,

> The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes, but is not limited to, the following:
>
> (i) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

19 U.S.C. § 1677(5)(A). Annex A to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade contains the Illustrative List of Export Subsidies (List), and provides, *inter alia,*:

> (d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, *if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.*

H.R. Doc. No. 153, Pt. I, 96th Cong. 1st Sess. 295 (1979) (emphasis added). Item (d) of the List is thereby incorporated into the U.S. statute.

Section 1677(5) clearly gives broad discretion to Commerce in determining what constitutes a countervailable subsidy. The question presented is whether Commerce may deem irrelevant the preferential provision of input materials which Congress determined not countervailable under item (d) of the List.

The government emphasizes the phrase "but is not limited to" in interpreting § 1677(5). The government asserts Commerce has broad authority to create new categories of subsidies and claims the exception in item (d) is irrelevant in determining the countervailability of the IPRS payments. This interpretation, however, could result in the elimination of the exception to the countervailable subsidy provided in item (d). While item (d) authorizes Commerce to countervail the provision of input materials at more favorable terms to exporters than domestic producers, such countervailing duties are not permitted if the terms are not more favorable than those commercially available on world markets. Commerce's determination is contrary to the express intent of Congress, and its interpretation of § 1677(5) is not entitled to deference.

Commerce, therefore, must examine the IPRS in light of item (d) and determine whether the Indian government's provision of pig iron was on terms more favorable than on world markets, as Commerce did in the administrative review of the 1984 calendar year. *See RSI (India) Pvt., Ltd. v. United States*, 12 CIT 331, 687 F. Supp. 605 (1988), *aff'd*, 7 Fed. Cir. (T) 100, 876 F.2d 1571 (1989).

Commerce's determination is also contrary to the legislative history of the Trade Agreements Act of 1979 which provides that Congress granted the agency the discretion to expand the categories of countervailable subsidies "consistent with the underlying principles implicit in these enumerations." H.R. Rep. No. 317, 96th Cong., 1st Sess. 74 (1979); *see also* S. Rep. No. 249 at 85, *reprinted in* 1979 U.S.C.C.A.N. 381, 471. Although the List provides examples which the agency has the authority to expand, new categories of countervailable export subsidies may not be inconsistent with the items on the List.

Furthermore, the Supreme Court stated that "[t]he countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455–56 (1978) (citations omitted). At issue in *Zenith Radio* was the failure of a foreign government to impose an indirect tax on exported products while imposing the tax on domestically-sold products. *Id.* at 445. A domestic manufacturer brought suit challenging the agency's determination not to countervail. In affirming the agency's long-standing practice not to countervail nonexcessive remission of an indirect tax, the Supreme Court upheld the agency's interpretation that such remission did not result in the type of competitive advantage that Congress intended to counteract. *Id.* at 456. Similarly, Congress has determined by adopting item (d) of the List that there is no such unfair competitive advantage bestowed to exporters if a foreign government provides input materials at terms not more favorable than those commercially available on world markets. The elimination of the item (d) exception by countervailing all preferential provision of input materials is contrary to the purpose of the countervailing duty law.

Finally, the government argues that the IPRS would be countervailable even if item (d) is applied because the calculation of the IPRS payments was not related to the actual consumption of pig iron and the Indian government's "international price" was not the actual world market price. Since this is a determination to be made by Commerce pursuant to 19 U.S.C. § 1675, the case is remanded to Commerce to determine whether the IPRS payments qualify for the exception under item (d).

CONCLUSION

This action having been submitted for decision and oral argument, and upon due deliberation, it is

ORDERED that the action is remanded to Commerce to determine whether the IPRS payments qualify for the exception under item (d) of the List, and it is further

ORDERED that Commerce shall file the remand results within 45 days from the date of this opinion.

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(Slip Op. 92–8)

AMERICAN PERMAC, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 91–02–00155

[ITA determination sustained.]

(Dated February 4, 1992)

*Barnes, Richardson & Colburn* (*Rufus E. Jarman, Sandra Liss Friedman* and *Alan Goggins*) for plaintiffs.

*Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, United States Department of Justice, Civil Division (*Velta A. Melnbrencis*), for defendant.

OPINION

RESTANI, *Judge*: This matter is before the court on plaintiffs' Rule 56.1 motion for summary judgment on the administrative record. Plaintiffs challenge the final results of the administrative review of the antidumping duty determination regarding drycleaning machinery from Germany. The review resulted in a dumping margin of 1.35 percent for machinery of the plaintiff exporter. *Drycleaning Machinery From Germany; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 2901, 2902 (Jan. 25, 1991) ("*Final Results*").

Plaintiffs claim that almost all of the duties imposed are attributable to five machines which represented less than five percent of sales and which were of a design that was being replaced in the U.S. market. In fact, these five machines were the last of the particular model imported into the United States.

As this was the only model of plaintiffs which was also sold in the home market and as home market sales were made exclusively to end users as opposed to both end users and distributors, plaintiffs sought a level of trade adjustment for this model. *See* 19 C.F.R. § 353.58 (1991). The level of trade adjustment, which involved bad debt and indirect sales office expenses, was granted. *Final Results* at 2902.

Plaintiffs assert that they also requested an additional level of trade adjustment, exclusion of the sales, or some other adjustment, because

sales of the model at issue were discontinued in the United States. The court finds no evidence that exclusion or some other adjustment for model discontinuance was claimed at the time the questionnaire response was submitted. Plaintiffs allege that this claim was made in its prehearing brief of December 5, 1990. Pub. Doc 19. They also allege that there is ample factual support in the record for such a claim.

First, the court finds that the only claim made in the prehearing brief was for a level of trade adjustment. Furthermore, although there was a passing reference to obsolescence, no claim was made in the brief for a level of trade adjustment based on the fact that the model had been discontinued or was "obsolete.[1] Assuming *arguendo* that the prehearing brief asked for an additional level of trade adjustment, the court fails to see how an adjustment for differences *in levels of trade in the home market versus the U.S. market* is applicable to a problem of model discontinuance in the United States. This has never been explained. Although plaintiffs might have attempted to support a circumstance of sale adjustment, (*see* 19 U.S.C. § 1677b(a)(4)(B) (1988)), or some other rational adjustment based on market differences, they did not do so. The court must conclude that plaintiffs are not entitled to an *adjustment* to U.S. or foreign market price of any type for model discontinuance because they did not support such a claim.[2]

The real issue is plaintiffs' alternative claim for total exclusion of these five sales based on model discontinuance. This claim was raised for the first time at the hearing of December 20, 1990. *See* Pub. Doc. 20 at 10–11. Plaintiffs' claim for exclusion is based on their theory that these machines were discontinued or obsolete and thus outside the ordinary course of trade. As the court has made quite clear, regular exclusion of sales not in the ordinary course of trade only occurs on the home-market-sales side of the price comparison. *See Floral Trade Council v. United States* (*"Floral Trade III"*), 15 CIT ____, ____, 775 F. Supp. 1492, 1503 (1991) (sales of deteriorated flowers to street vendors not excluded in calculating U.S. price; adequate adjustment made via averaging); *Ipsco, Inc. v United States* (*"Ipsco"*), 12 CIT 384, 394–95, 687 F. Supp. 633, 641 (1988) (neither statute nor legislative history indicates Congress intended exclusion from U.S. price of all sales outside ordinary course of trade). It does not follow inexorably, however, that every U.S. sale of the merchandise under investigation must be included in every case. *See Ipsco,* 12 CIT at 395–96, 687 F. Supp. at 641–642. *Ipsco, Inc. v. United States,* 13 CIT 402, 408–409, 714 F. Supp. 1211, 1216–17 (1989); *Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 27, 704 F. Supp. 1114, 1126 (1989) *Asociacion Colombiana de Exportadores v. United States,* 13 CIT 526, 533–34, 717 F. Supp. 834, 841 (1989).

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[1] Apparently, the model contained "options" for pollution control that were unnecessary for the U.S. market. It was the preferred model in the home market.

[2] The court does not mean to imply that a circumstances of sale adjustment would be warranted if properly claimed and supported. That issue is not reached.

The distinction is that while U.S. sales outside the ordinary course of trade ordinarily should be included (this may be the very cause of injury), a methodology is to be applied which accounts for sales which are unrepresentative and which do not lead to a fair price comparison. Fair (apples to apples) comparison is the goal of the price comparisons required by the antidumping laws, as the courts have stated time and again. See *e.g., U.H.F.C. Co. v. United States*, 916 F.2d 689, 697 (Fed. Cir. 1990); *Smith-Corona v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *AOC International, Inc. v. United States*, 13 CIT 716, 718, 721 F. Supp. 314, 317 (1989).

ITA makes two arguments in response to the claim for exclusion. ITA's first argument is that plaintiffs did not request exclusion based on obsolescence and they may not request it now for the first time. In fact, plaintiffs did make the request at the hearing of December 20, 1990, for what appears to be the first time. ITA seems to have decided that such a request could not be made at that date. *See* Pub. Doc. 20 at 19 (indicating only level of trade adjustment issues were to be addressed at hearing). Furthermore, ITA did not address the exclusion issue in the final results, presumably because it thought the issue had not been timely raised.

Plaintiffs state that all factual data to support their new "legal theory" was in the record and that they may raise this "legal theory" at any time, and further that they were prevented from pointing out all the facts of record to support their claimed exclusion.

It appears to the court that ITA must have some latitude to control its proceedings and that it may limit the parties to making claims for adjustments or exclusions of sales to a time in advance of the final hearing. In fact, ITA's regulations provide that arguments are limited to those presented in writing prior to the hearings. *See* 19 C.F.R. § 353.38(b) (1991). This court has upheld other ITA rules intended to promote prompt and efficient factfinding in accordance with ITA's statutory mission. *See Floral Trade Council v. United States*, 12 CIT 1172, 704 F. Supp. 241 (1988) (*"Floral Trade II"*) (untimely request for below cost investigation rejected by ITA). "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure * * *.'" *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1977) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). Had plaintiffs requested exclusion of an entire group of sales prior to the hearing, they might be entitled to raise new legal theories to support such an exclusion, but the court does not believe that ITA abused its discretion when it declined to accept a new claim for exclusion at the final hearing.

ITA's second argument is that it had *no discretion* to exclude U.S. sales because this was an administrative review proceeding and not an original fair value investigation. Thus, they argue all U.S. sales must be included. It cites as support for this contention 19 U.S.C. § 1675(a)(2) (1988), which reads as follows:

**(2) Determination of antidumping duties**

For the purpose of paragraph (1)(B), the administering authority shall determine –

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States sales price of the entry.

19 U.S.C. § 1675(a)(2). The court has a difficult time reading the "each entry" language to compel inclusion of all sales, no matter how distorting or unrepresentative. In actuality, both original investigations and periodic reviews examine sales, not entries, and the methodology is not distinguishable in any relevant way.

Furthermore, although periodic reviews set final duty rates for certain sales, they also set deposit rates for future years. They must be fair and as broadly based as possible. This court has never decided that ITA's methodology on this issue may vary in periodic reviews from that applied in original fair value investigations. The court has held that if the sales are distorting, it is unfair to include them without some methodology which compensates for the distortion. *See Floral Trade Council v. United States*, 12 CIT 1163, 1168, 704 F. Supp. 233, 238–39 (1988) ("*Floral Trade I*"). ITA seems to ignore that in *Floral Trade III*, a periodic review case, the court found that inclusion of sales of deteriorated flowers to street vendors was non-distorting because averaging adjusted for perishability. The point the court was making in allowing inclusion of street vendor sales in *Floral Trade III* was that whether sales are in or out of the ordinary course of trade is not the determinative factor on the U.S. sales side of the equation. Fairness, distortion, representativeness are the issues to be examined. The goal is to include the sales but to utilize whatever methodology is needed to ensure a fair comparison.

Whether total exclusion of certain U.S. sales is among the methodologies ITA has discretion to utilize at the periodic review phase need not be resolved here, but the court seriously doubts Congress intended to compel distortions if exclusion of a few sales would remedy the problem.

Nonetheless, the court is not implying that any distortion occurred here. Distortion is certainly not clear from the record and ITA never addressed the issue of whether discontinuance of sales of this model in the U.S. market made the sales comparison so unfair that exclusion should have been granted. Because plaintiffs did not request or support a circumstances of sales adjustment and requested the unusual remedy of exclusion of sales for the first time at the hearing on their claim for a level of trade adjustment, ITA was not required to consider it. If the exclusion claim was viable, which is not certain, it is obviously a claim which required a coherent factual presentation early on, and that was not done. ITA's determination is sustained.

(Slip Op. 92–9)

NUNN BUSH SHOE CO. AND WEYCO GROUP INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 88–11–00828 (88–11–00829)

Plaintiffs move for summary judgment and defendant cross-moves for summary judgment. Plaintiffs contest defendant's liquidation of various entries of men's shoes and claim that the entries were liquidated as a matter of law four years after their initial entry. Plaintiffs also contest defendant's calculation of interest on the additional countervailing duty deposits.

*Held:* Pursuant to 19 U.S.C. § 1504, the relevant entries were liquidated by operation of law. Consequently, the issue of interest is moot since plaintiffs' motion for summary judgment is granted.

[Upon cross-motions for summary judgment, plaintiffs' motion granted, defendant's motion denied.]

(Dated February 5, 1992)

*Hodes & Pilon* (*Michael G. Hodes* and *Zoya Khotimlyansky*) for plaintiffs.

*Stuart M. Gerson*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); of counsel: *Edward N. Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Nunn Bush Shoe Company and Weyco Group Inc. (collectively "Nunn Bush"), move for summary judgment pursuant to Rule 56 of the rules of this Court. Plaintiffs maintain that they are so entitled because their entries were liquidated by operation of law at the duty rate asserted at the time of entry. Thus, plaintiffs contend that Customs' latter liquidation was unlawful and is consequently void.

Defendant, while opposing plaintiffs' motion, cross moves for summary judgment on grounds that Customs properly liquidated the entries at the rates established pursuant to the administrative review.

As there is no genuine issue as to any material fact, summary judgment is in order. *See Dan-Dee Imports, Inc. v. United States,* 7 CIT 241, 243 (1984). The Court must therefore determine whether, as a matter of law, either party has fully demonstrated its entitlement to such judgment. *See Phone-Mate, Inc. v. United States,* 12 CIT 575, 690 F. Supp. 1048 (1988). For the reasons set forth below, the Court finds that plaintiffs are entitled to judgment as a matter of law.

BACKGROUND

This action, involving finished men's shoes imported from Spain, contests the denial of two protests, Nos. 3901–6–000680 and 3701–86–000048, filed by Nunn Bush and two protests, Nos.

3901–6–000679 and 3701–86–000047, filed by Weyco Group Inc.[1] The merchandise at issue was entered at the ports of Milwaukee, Wisconsin and Chicago, Illinois, between September 30, 1980 and April 16, 1982. The merchandise was subject to countervailing duties resulting from a final affirmative determination issued by the defendant on September 12, 1974. *See Liquidation of Duties: Non-rubber Footwear From Spain,* 39 Fed. Reg. 32,904 (Sept. 12, 1974). At the time of entry, plaintiffs deposited estimated duties of 2.27% *ad valorem*. Liquidation of the entries was suspended pending the final results of an administrative review conducted in Countervailing Duty Investigation No. C469–022, for the period January 1, 1980 to December 31, 1982. The final results of the administrative review were issued on July 25, 1984, and the aggregate subsidy was determined to be 3.67% *ad valorem* for 1981, and 2.57% *ad valorem* for the period between January 1, 1982 to May 2, 1982. Subsequently, this court issued injunctions enjoining defendant from liquidating the entries filed during 1981 and 1982 in *Volume Footwear Retailers of America v. United States*, Court No. 84–8–01083 (injunction issued on August 10, 1984) and Court No. 83–10–01500 (issued on November 9, 1983). *See Volume Footwear Retailers of America v. United States*, 10 CIT 12 (1986). On February 5, 1985, Court Nos. 84–8–01083 and 83–10–01500 were consolidated. The injunctions were dissolved on May 15, 1985, at which time the entries were not yet four years old. *Id.* at 15. On December 16, 1985, the court again enjoined the defendant from liquidating plaintiffs' entries. That injunction was lifted on January 3, 1986. *Id.* at 12. Defendant subsequently liquidated the entries at issue on February 7, 1986, and on March 21, 1986, after many entries were over four years old.[2] At this time, countervailing duties equaling 3.67% *ad valorem* were issued for 1981 and 2.57% *ad valorem* for 1982. Moreover, the defendant assessed interest on these additional countervailing duties pursuant to 19 U.S.C. § 1677g (1988).

## DISCUSSION

I. *The entries were liquidated by operation of law pursuant to 19 U.S.C. § 1504:*

Liquidation has been defined as "the final computation by the Customs Service of all duties (including any antidumping or countervailing duties) accruing on that entry." *American Permac, Inc. v. United States*, 10 CIT 535, 537, 642 F. Supp. 1187, 1190 (1986). Under 19 U.S.C.

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[1] This action was commenced by plaintiff in the name of "Weyenberg Shoe Manufacturing Co." Plaintiff subsequently changed its name to Weyco Group Inc. Nunn Bush Shoe Company is the wholly-owned subsidiary of Weyco Group Inc.

[2] Plaintiffs allege and defendant admits the following:

Of the eighteen entries pertaining to Protest No. 3901–6–000680, thirteen entries were filed prior to March 21, 1982, and became four years old before the March 21, 1986 liquidation by the defendant. Of the twenty-three entries pertaining to Protest No. 3701–86–000048, eighteen entries were filed prior to February 7, 1982 and became four years old prior to the February 7, 1986 liquidation by the defendant. *See* Collective Exhibit A, *Complaint and Answer*, paragraphs 20–21.

Of the entries pertaining to Protest No. 3901–6–000679, three entries were filed prior to March 21, 1982, and became four years old before the March 21, 1986 liquidation by defendant. Furthermore, of the fifteen entries pertaining to Protest No. 3701–86–000047, fourteen entries were filed prior to February 7, 1982 and became four years old before the February 7, 1986 liquidation by defendant. *See* Collective Exhibit B, *Complaint and Answer*, paragraphs 20–21.

§ 1504, Customs is bound by certain time limits during which liquidation must occur. *See* 19 U.S.C. § 1504 (1988).

Generally, an entry of merchandise not liquidated within one year[3] "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record." 19 U.S.C. § 1504(a). Pursuant to § 1504(b), however, Customs may extend this period if:

> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
> (2) liquidation is suspended as required by statute or court order; or
> (3) the importer of record requests such extension and shows good cause therefore.

In any event, any entry which is not liquidated within four years is deemed liquidated by operation of law at the initially asserted amount, unless liquidation continues to be suspended as required by statute or court order. 19 U.S.C. § 1504(d). If so, "[w]hen such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom." *Id.*

Plaintiffs contend that many of the entries were deemed liquidated by operation of law when they became four years old since the injunctions were lifted prior to the fourth anniversary of their entry. Moreover, plaintiffs claim that since these entries were not subject to any statutory or court ordered suspension of liquidation when they turned four years old, they were deemed liquidated by operation of law at the initially asserted amount.

Defendant counters that the law as written is unfair since, in essence, a suspension could be lifted just a day or so prior to the expiration of the four years, and expecting Customs to liquidate that quickly would be unreasonable.

The defendant heavily relies on this court's decision in *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 691 F. Supp. 364 (1988), *aff'd*, 884 F.2d 563 (Fed. Cir. 1989). In *Canadian Fur Trappers*, this court likewise reviewed the liquidation of goods subject to an outstanding countervailing duty order. Since the suspension of the entries involved in that case was lifted after four years had expired, the issue was whether the Customs Service was required to liquidate the entries within 90 days pursuant to § 1504(d). As previously stated, when an extension[4] is lifted after four years have passed, then Commerce has 90

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[3] Section 1504(a) reads in part that an entry of merchandise not liquidated within one year from:

> (1) the date of entry of such merchandise;
> (2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or
> (3) the date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;
>
> * * * * * * *

[4] *See* 19 U.S.C. § 1504(b) (listing the three ways to extend the four-year period).

days during which they "shall" liquidate. *See* 19 U.S.C. § 1504(d). In *Canadian Fur Trappers*, the word "shall" was determined not to be mandatory, but rather discretionary. In fact, the legislative history explicitly states that "[t]his last provision is discretionary, rather than mandatory, and recognizes that there will be instances when it may be impossible to complete liquidation within 90 days because of the sheer number of entries to be liquidated after a long continued suspension." H.R. Rep. No. 95–621, 95th Cong., 1st Sess. 26 (1977).

This interpretation, however, applies only to entries that remain suspended beyond the four year statutory period. Nowhere in the legislative history is it stated that the provision, requiring an entry of merchandise to be liquidated within four years, is discretionary. Therefore, the *Canadian Fur Trappers* decision is binding on the issue at bar only with respect to the entries that remained suspended beyond the four years. Plaintiffs, however, do not question the liquidation of the entries which were suspended longer than four years. Plaintiffs contest only the entries in which a suspension or the like is lifted prior to four years and *Canadian Fur Trappers* is silent regarding these entries.

It is the obligation of this Court to interpret statutes. It is not the role of the Court to re-write the statutes as Congress hands them to us. It has been stated that "problems of statutory construction require the Court to first peruse the language employed by Congress in the statute and regard the intent of Congress as expressed in the plain meaning of the words." *See E.C. McAfee & Co. A/C Rolykit Div. of Hagenmeyer (Canada), Ltd. v. United States,* 12 CIT 648, 653 (1988). Furthermore, when a statute is "unambiguous, judicial inquiry is complete." *Rubin v. United States,* 449 U.S. 424, 430 (1981). Section 1504 unambiguously states that if an entry is not liquidated within four years, then it will be deemed liquidated by operation of law unless the period is extended as per 19 U.S.C. § 1504(b)(1)–(3). In this case, the period was not extended beyond four years. Therefore, the Court must uphold the plain meaning of the law and hold that the entries which turned four years old were liquidated by operation of law and any subsequent attempts by Commerce to liquidate these entries are invalid.

II. *The issue of interest is moot:*

Plaintiffs also contest the calculation of interest on the additional countervailing duty deposits. Plaintiffs claim that the defendant improperly calculated the interest using compound interest. In fact, defendant concedes that they erroneously used compound interest. Nevertheless, since this Court holds that plaintiffs prevail on the first issue, the issue regarding interest is moot since additional duties are not assessable on the entries.

## CONCLUSION

Pursuant to 19 U.S.C. § 1504, the entries were deemed liquidated by operation of law when they became four years old since the liquidation was not suspended in any way. Thus, any subsequent liquidation by the defendant after four years is invalid. Therefore, the entries shall be liquidated at the rate asserted at the time of entry by the importer of record.

Accordingly, plaintiffs' motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

| DECISION NO./DATE JUDGE | PLAINTIFF | COURT NO. | ASSESSED |
|---|---|---|---|
| C92/9<br>2/4/92<br>Restani, J. | E. Dillingham, Inc. | 88–1–00056 | 254.46 or 254.56<br>Various rates |
| C92/10<br>2/4/92<br>Restani, J. | Heath Co. | 91–4–00255 | 9405.40.6000<br>7.6% |
| C92/11<br>2/4/92<br>Restani, J. | KMart Corp. | 91–6–00427 | 8513.10.20<br>25% |
| C92/12<br>2/4/92<br>Aquilino, J. | What's What, Inc. | 90–1–00044 | 700.45<br>10% |

| | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|---|---|---|---|
| | 252.67 or 252.75<br>Various rates | Dillingham *v.* U.S., S.O. 91–40 | Champlain<br>Printing paper or writing paper |
| | 9405.40.8000<br>3.9% | Agreed statment of facts | Los Angeles<br>Security lighting control systems |
| | 9503.90.60<br>6.8% | Agreed statement of facts | Los Angeles<br>"06 Disney Mickey & Donald Fun Faces Flashlights |
| | 700.20<br>2.5% | Agreed statement of facts | New York<br>Ladies shoes |

U.S. COURT OF INTERNATIONAL TRADE,
OFFICE OF THE CLERK,
*New York, NY, January 29, 1992.*

## *NOTICE*

On January 29, 1992, the United States Court of International Trade authorized the publication for public comment of proposed Revised Rules Governing Complaints of Judicial Misconduct and Disability.

This notice is given to provide an opportunity for public comment upon the proposed Revised Rules.

Any person interested in receiving the proposed Revised Rules may obtain a copy of them by submitting a request in writing by the close of business on Friday, February 28, 1992. Any comments shall be in writing and shall be submitted by the close of business on Tuesday, March 31, 1992.

All requests and comments shall be sent to:

Joseph E. Lombardi
Clerk of the Court
United States Court of International Trade
One Federal Plaza
New York, NY 10007

All comments received will be forwarded to the court for its consideration.

JOSEPH E. LOMBARDI,
*Clerk of the Court.*

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U.S. G.P.O. 1992–282–776:20071